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Nos. 84-1877 and 84-1938

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

THE STEARNS COMPANY, ET AL., PETITIONERS

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL.

GABRIEL ENERGY CORPORATION, PETITIONER

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 522(e)(2) of the Surface Mining Control and Reclamation Act of 1977 (Surface Mining Act), 30 U.S.C. 1272(e)(2), which prohibits, with certain exceptions, "surface coal mining operations * * * on any Federal lands within the boundaries of any national forest," applies to a privately-held mineral estate underlying a federally-owned surface estate within a national forest.

2. Whether Section 522(e)(2) of the Surface Mining Act applies to lands that were acquired under Section 11 the Weeks Act of 1911, 16 U.S.C. 521, to be permanently reserved, held, and administered as national forest lands, but which are not within the boundaries of a national forest established by presidential proclamation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) [1] is reported at 753 F.2d 521. The opinions of the district court granting partial summary judgment for the government (Pet. App. 8a-17a) and denying petitioners' motion for reconsideration (Pet. App. 18a-26a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 28a-29a) was entered on January 29, 1985, and a petition for rehearing was denied on March 15, 1985 (Pet. App. 30a).

[1] Unless otherwise indicated, "Pet. App." refers to the appendix to the petition in No. 84-1877.

The petitions for a writ of certiorari in both cases were filed on June 12, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. Section 522(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1272(e), provides in pertinent part:

> After August 3, 1977, and subject to valid existing rights no surface coal mining operations except those which exist on August 3, 1977, shall be permitted—
>
> * * * * *
>
> (2) on any Federal lands within the boundaries of any national forest: *Provided, however,* That surface coal mining operations may be permitted on such lands if the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations and—
>
> (A) surface operations and impacts are incident to an underground coal mine[.]

2. Section 701(4) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1291(4), provides in pertinent part:

> "Federal lands" means any land, including mineral interests, owned by the United States without regard to how the United States acquired ownership of the land and without regard to the agency having responsibility for management thereof * * *.

3. Section 11 of the Weeks Law (Weeks Act of 1911), 16 U.S.C. 521, provides as follows:

> Subject to the provisions of section 519 of this title the lands acquired under this Act shall be permanently reserved, held. and administered as national forest lands under the provisions of section

> 471 of this title and acts supplemental to and amendatory thereof. And the Secretary of Agriculture may from time to time divide the lands acquired under this Act into such specific national forests and so designate the same as he may deem best for administrative purposes.

4. Section 21 of the Creative Act of 1891, 16 U.S.C. (1970 ed.) 471 (repealed by Section 704(a) of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2792), provided in pertinent part as follows:

> The President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forests, and the President shall, by public proclamation, declare the establishment of such forests and the limits thereof.

5. The Act of June 4, 1987, 16 U.S.C. 473, provides as follows:

> The President of the United States is authorized and empowered to revoke, modify, or suspend any and all Executive orders and proclamations or any part thereof issued under section 471 of this title, from time to time as he shall deem best for the public interests. By such modification he may reduce the area or change the boundary lines or may vacate altogether any order creating a national forest.

STATEMENT

1. The Surface Mining Control and Reclamation Act of 1977 (Surface Mining Act), 30 U.S.C. 1201 *et seq.*, establishes "a nationwide program to protect society and the environment from the adverse effects of surface

coal mining operations," including surface operations and surface impacts incident to underground coal mines. Sections 102(a) and 701(28), 30 U.S.C. 1202(a) and 1291(28). See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 268-269 (1981). It is the express purpose of the Act to "wherever necessary, exercise the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations." Section 102(m), 30 U.S.C. 1202(m).

One of the means selected by Congress to effectuate the goals of the Surface Mining Act involves the designation of areas unsuitable for surface coal mining. Section 522, 30 U.S.C. 1272. Section 522(e) of the Act, 30 U.S.C. 1272(e), contains a general prohibition on certain public and private surface coal mining operations, including operations on lands within the boundaries of the National Park System, the National Wildlife Refuge Systems, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, and "on any Federal lands within the boundaries of any national forest." This prohibition, however, does not apply to surface coal mining operations in existence on August 3, 1977, and is also "subject to valid existing rights." 30 U.S.C. 1272 (e)(2). Furthermore, surface coal mining operations may be permitted on such lands if the Secretary of the Interior "finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations and [the] surface operations and impacts are incident to an underground coal mine." 30 U.S.C. 1272 (e)(2) and (A). See also 30 C.F.R. 761.11.

2. In 1937, the United States acquired the surface estate to a tract of land in McCreary County, Kentucky, from petitioner Stearns Company. The acquisition was made pursuant to the Weeks Act of 1911, ch. 186, 36 Stat. 961 *et seq.,* as amended by the Clarke-McNary Act,

16 U.S.C. 515, which authorizes the United States to purchase land to be held as national forest lands.[2] Petitioner Stearns reserved the mineral estate and, in 1980, leased a portion of its mineral interests to petitioner Ramex Mining Corporation. When the Secretary of the Interior, acting through the Office of Surface Mining Reclamation and Enforcement (OSM), learned that petitioners Stearns and Ramex were proposing to conduct underground mining operations that would disturb the surface of the tract, which is situated in the Daniel Boone National Forest, petitioners were notified that their proposed activities were subject to Section 522(e) of the Surface Mining Act.

Petitioner Gabriel Energy Corporation is a Kentucky corporation with a leasehold interest in the mineral estate in a tract of land located in Owsley County, Kentucky. In 1973, the United States acquired the surface estate to the tract of land pursuant to the Weeks Act and the Clarke-McNary Act. The tract is situated in the Redbird Purchase Unit and administered by the Department of Agriculture's Forest Service. It is not, however, within the proclaimed boundaries of any specifically-named national forest.

In January 1981, OSM advised Gabriel that its proposed mining activity was subject to Section 522(e)(2) (84-1938 Pet. App. 30a-31a). In response, Gabriel filed this action in the United States District Court for the Eastern District of Kentucky, seeking a declaratory judgment that its proposed mining operations are not subject to Section 522(e)(2) because the operations will not occur "on Federal lands." At about the same time, a similar action was brought by Ramex. In support of

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[2] The Acts authorize the government to purchase only the surface estate in order to reduce the costs of acquisition whenever such purchases do not impair the purposes of the Acts. See 16 U.S.C. 518; 84-1938 Pet. 5 n.l.

their contention that Section 522(e) is inapplicable to their proposed mining operations, petitioners Ramex and Stearns, which intervened as a party plaintiff in the action brought by Ramex, argued that the reservation of a mineral estate under Kentucky law includes the right to utilize the surface to the extent necessary to extract underground coal. Consequently, petitioners contended that OSM cannot require them to demonstrate that they either possess "valid existing rights" or are otherwise exempted from the general prohibition of Section 522(e) prior to disturbing the federal surface estate.

3. The district court consolidated the two cases and rejected petitioners' reading of Section 522(e) as contrary to the language and legislative history of the Surface Mining Act (Pet. App. 8a-17a). Relying on this Court's decision in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, supra,* the district court first held that Congress has the constitutional authority to regulate the challenged conduct (Pet. App. 13a-14a). Second, the court found that Congress had in fact chosen to regulate the specific conduct at issue (*id.* at 14a):

> If the plaintiffs were able to remove the minerals in question without disturbing the surface, clearly "federal lands," the [petitioners'] arguments and recitation of the law of property would become relevant. However, common sense indicates that the [petitioners] will by necessity disturb the surface of "federal lands" by either underground or surface (especially) mining and this disruption is what the Act is designed to regulate.

The district court further noted that Congress recognized that in many instances private proprietary interests would underlie federal lands subject to the Surface Mining Act, but nevertheless directed in Section 522(e)(2) that, with the exceptions provided and subject

to valid existing rights, mining should not take place on federal national forest lands (Pet. App. 15a, 19a-20a).[3]

Petitioners moved for reconsideration, renewing their argument that Section 522(e)(2) is inapplicable to privately-held mineral interests. In addition, petitioner Gabriel raised a new argument, contending that the tract at issue in its case is not "within the boundaries of any national forest" because the tract is located within the Redbird Purchase Unit but not within the specifically-designated Daniel Boone National Forest. The district court rejected both contentions (Pet. App. 18a-27a). With respect to the "boundary" argument, the court held that the exclusion from Section 522(e)(2) of purchase units, which are part of the National Forest System and which in time may be designated as specific national forests, "would frustrate the intention of the Weeks Act as well as the Surface Mining Control and Reclamation Act of 1977" (Pet. App. 26a).

The court of appeals (Stewart, Associate Justice (Retired), Engel & Merritt, JJ.) affirmed (Pet. App. 1a-7a). Noting "the conceded attendant effects on the surface of [the federal national forest] lands," the court of appeals held that petitioners' mining proposals "fit [] squarely within the common sense meaning of the phrase 'on federal lands' as used in section 1272(e)(2)" (Pet. App. 5a). The court of appeals also concluded

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[3] The district court also held that the Act's requirement that judicial review of the validity of federal regulations be sought only in the United States District Court for the District of Columbia (Section 526(a)(1), 30 U.S.C. 1276(a)(1)) was inapplicable because petitioners were challenging the applicability of the statute itself and not the validity of any regulations promulgated thereunder (Pet. App. 9a-11a). The court additionally found that petitioners need not exhaust their administrative remedies, that any taking claims were not yet ripe, and that OSM has primary jurisdiction over the extent and nature of federal regulation of petitioners' proposed activities (*id.* at 11a-17a).

(*id.* at 6a-7a) that Section 522(e)(2) governs lands within the Redbird Purchase Unit insofar as they were acquired, held, and administered as "national forest" lands under Section 11 of the Weeks Act, 16 U.S.C. 521.[4]

ARGUMENT

The decision of the court of appeals, which petitioners correctly note (84-1938 Pet. 9 & n.4) involves an issue of first impression, is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. a. The argument that is common to both petitions is that the proposed mining activities do not constitute "surface coal mining operation[s] * * * on * * * Federal lands within the boundaries of [a] national forest" because the mining of the subsurface mineral estate will not occur "on Federal lands." Petitioners assert that the "common sense" reading given Section 522(e)(2) by the district court and the court of appeals is contrary to both the statute's language and legislative history. In addition, petitioners claim that federal regulation of privately-held mineral estates underlying federally-owned surface estates within a national forest is contrary to "universally accepted property law principles" (84-1877 Pet. 17) and is in conflict with petitioners' "absolute right to mine" (*id.* at 26). Finally, petitioners argue that, if in fact Section 522(e)(2) does encompass private mineral interests underlying national forest lands, then the statutory provision is unauthorized by the Commerce and Property Clauses of the Constitution and constitutes a "unilateral[ ] conscript[ion] [of]

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[4] The court of appeals additionally affirmed the district court's rulings that the Surface Mining Act is not facially invalid and that any taking claims were not ripe for adjudication (Pet. App. 5a-6a).

property rights" (84-1877 Pet. 21). Each of these contentions is wholly without merit.[5]

b. Petitioners contend (84-1877 Pet. 5) that "Congress meant to limit the application of Section [522(e)(2)] to those lands in which the United States has a proprietary interest in the minerals, rather than have it apply to lands owned by private individuals." In support of their contention, petitioners point to the Act's definition of the term "Federal lands" as "any land, including mineral interests, owned by the United States." Section 701(4), 30 U.S.C. 1291(4). It is beyond cavil, however, that federally-owned surface estates are "Federal lands."

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[5] Both petitions raise essentially the same arguments regarding the applicability of Section 522(e)(2). Petitioner Gabriel Energy Corporation, however, does make a somewhat broader assertion that "the [decision of the] Court of Appeals alters both the nature of all property of all kinds and in all situations and the nature and relationship between the estates in land" (84-1938 Pet. 13-14). It is clear, however, that Congress recognized that state law governs disputes involving the respective property rights of the owners of mineral and surface estates. See S. Rep. 95-128, 95th Cong., 1st Sess. 56 (1977) ("[T]his Act does not attempt to tamper with such State laws."). But this case is not a property dispute involving the United States in its proprietary capacity; rather, the dispute concerns the regulatory scope of a statute. The legislative history indicates that certain private rights were to be accommodated through the mechanism of a "valid existing rights" determination, to which Section 522(e) 's prohibitions are subject. By holding that privately-held mineral estates located within national forests fall under Section 522(e)(2)'s regulation of mining activities "on Federal lands," the court of appeals did not, as Gabriel suggests (84-1938 Pet. 23), treat privately-held mineral estates as "federal lands" and "redefine 'property' itself." Instead, the court upheld the power of Congress to regulate surface mining operations that "result in disturbances of surface areas that burden and adversely affect commerce * * * by destroying or diminishing the utility of land for * * * forestry purposes." Section 101(c), 30 U.S.C. 1201(c). See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 277.

Furthermore, as noted by the court of appeals (Pet. App. 5a), "surface mining" as defined by the Act includes "surface impacts incident to an underground coal mine." Section 701(28)(A), 30 U.S.C. 1291(28)(A). Thus, Section 522(e)(2) provides that, subject to valid existing rights and with the exceptions provided, no underground coal mining that has surface impacts shall be permitted on federally-owned surface estates within the boundaries of any national forest. Section 522(e)(2), as fairly read by the district court and the court of appeals, consequently does encompass petitioners' proposals to extract coal beneath national forest lands.[6]

Moreover, the court of appeals' interpretation of Section 522(e)(2) is consistent with the purposes Congress sought to promote in enacting the Surface Mining Act. See *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103, 118 (1983). The surface estates overlying petitioners' mineral interests were acquired pursuant to Sections 6 and 11 of the Weeks Act, ch. 186, 36 Stat. 962 and 963, and Section 6 of the Clarke-McNary Act, ch. 348, 43 Stat. 654, which authorize the purchase of forest lands for the purposes of promoting the navigation of streams and the production of timber. 16 U.S.C.

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[6] Petitioners' reliance on Kentucky property law ignores the district court's point that "[t]he central question * * * [is] whether the government has chosen to regulate mining [of private coal] upon or beneath the surface [of national forest lands]" (Pet. App. 20a). Even if an owner of a mineral estate may be deemed under Kentucky law to go " 'on' his own land" when he goes on the physical surface to remove the coal (84-1877 Pet. 10), the rights that are granted mineral owners under state law cannot alter the fact that such mining operations occur "on" national forest lands and are therefore within the scope of Section 522(e)(2).

515, 521. As Congress declared in Section 101(c) of the Surface Mining Act, 30 U.S.C. 1201(c):

> [M]any surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for * * * forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, * * * and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources.

The court of appeals' interpretation of Section 522(e)(2) gives effect to the congressional purposes behind the Surface Mining Act by requiring operators who seek to extract privately-held minerals "on any Federal [national forest] lands" first to demonstrate either a "valid existing right" to engage in mining operations or, absent such a right, that the proposed surface operations and impacts are incident to an underground coal mine and that such surface operations are compatible with significant recreational, timber, economic, or other values.[7]

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[7] Petitioners' interpretation of Section 522(e)(2), in contrast, imputes to Congress the intent to leave federal surface estates within national forests unprotected from mining operations conducted without any prior determination that the operator possesses a valid existing right to extract the underlying minerals. It has been estimated that more than 30%, or 8,000,000 acres of national forest lands, are underlain with private minerals. Affidavit of Rodney F. Young, Acting Director, Lands Staff, U.S. Dep't of Agriculture, Forest Service (Exhibit B to Federal Memorandum in Response to Plaintiff's Motion for Summary Judgment (filed July 17, 1981)).

The holding of the court of appeals is further supported by the legislative history of Section 522(e). In enacting that Section, Congress imposed a broad prohibition on surface coal mining operations on specified federal lands. See H.R. Conf. Rep. 95-493, 95th Cong., 1st. Sess. 111 (1977) ("Both the Senate amendment and the House bill contained similar provisions barring strip mining in national forests with limited exceptions."). The scope of Section 522(e)(2), however, is subject to valid existing rights, as noted in S. Rep. 95-128, 95th Cong., 1st Sess. 94-95 (1977):

> This subsection [522(e)] would prohibit new surface coal mining operations on lands within * * * National Forests * * *.
>
> All of these bans listed in subsection (e) are subject to valid existing rights. This language is intended to make clear that the prohibition of strip mining on the national forests is subject to previous state court interpretation of valid existing rights. The language of [522(e)] is in no way intended to affect or abrogate any previous state court decisions. The party claiming such rights must show usage or custom at the time and place where the contract is to be executed and must show that such rights were contemplated by the parties. The phrase "subject to valid existing rights" is thus in no way intended to open up national forest lands to strip mining where previous legal precedents have prohibited stripping.

Congress thus intended that Section 522(e)(2) would prohibit the mining of private mineral estates underlying national forest lands, but provided that all valid existing property rights would be preserved. The requirement that operators demonstrate the possession of valid existing rights before commencing surface mining

operations on national forest lands underscores the intent of Congress to regulate private mineral interests pursuant to Section 522(e)(2).[8]

Petitioners assert (84-1877 Pet. 13-14) that the legislative history of the Surface Mining Act indicates that there was no intention on the part of Congress "to interfere with the rights of private mineral estate owners to extract their coal under state law." The legislative materials relied upon do reflect Congress's concern for the preservation of valid existing property rights. See H.R. Rep. 95-218, 95th Cong., 1st Sess. 189 (1977) ("[N]or is the legal right to mine the coal in any way modified if such right existed prior to enactment of the Act."); S. Rep. 95-128, *supra,* at 56 ("[A]ll valid existing property rights must be preserved."). By inserting the exception for "valid existing rights" into Section 522(e)(2), Congress intended to protect private owners of minerals underlying federal surface estates.[9]

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[8] Contrary to petitioners' protestations (84-1877 Pet. 15), the application of Section 522(e)(2) to privately-held mineral estates within national forests will not cause "the existing system of property rights [to] be thrown into total disarray." If operators do possess the rights that petitioners claim are granted mineral owners under Kentucky law, they need only demonstrate their valid existing right to mine under state law prior to conducting their proposed mining operations. While it is not clear that mineral owners do in fact enjoy an "absolute right to mine" (84-1877 Pet. 26), see *Commerce Union Bank* v. *Kinkade,* 540 S.W.2d 861, 864 (Ky. 1967), cert. denied, 430 U.S. 915 (1977); *United States* v. *Stearns Co.,* 595 F. Supp. 808, 812-813 (E.D. Ky. 1984), that issue is not presented by this case because petitioners assert that they may mine the coal in question without any prior determination of valid existing rights.

[9] It is clear from congressional reports accompanying predecessor bills to the Surface Mining Act that when Congress inserted the exception for valid existing rights in its prohibition on mining within national forests, it was aware of the concept of severed surface and mineral estates. See H.R. Rep. 94-1445, 95th Cong., 2d Sess. 47 (1976); H.R. Conf. Rep. 93-1522, 93d Cong., 2d Sess. 85-86 (1974).

It did not intend, however, to leave national forest lands unregulated and open to surface coal mining operations without any prior showing of a valid existing right to mine.[10]

Petitioners also argue (84-1877 Pet. 18-23) that, if Section 522(e)(2) is applied to privately-held mineral interests, it is an invalid exercise of the authority granted Congress by the Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, and the Property Clause, U.S. Const. Art. IV, § 3, cl. 2. Although this Court, in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. at 275-283, rejected the claim that the Surface Mining Act is beyond the scope of congressional power under the Commerce Clause, petitioners argue (84-1877 Pet. 18) that "*Hodel* simply has no application to the issue presented here." The fact remains, however, that the Court there recited a provision (Section 101(c), 30 U.S.C. 1201(c)) which declares, inter alia, that "many surface mining operations result in disturbances of surface areas that burden * * * commerce * * * by destroying or diminishing the utility of land for * * * forestry purposes," and held that "[t]his congressional finding is sufficient to sustain the Act as a valid exercise of Congress' power under the Commerce Clause" (452 U.S. at 281). This holding applies to Section 522(e)(2) as well as to the rest of the Act. What this Court refrained from deciding in *Hodel* was

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[10] The fact that Congress, in S. Rep. 95-128, *supra,* at 56, proposed "some departure from existing practice" when the federal government owns the coal but not the surface does not support petitioners' argument (84-1877 Pet. 11 (emphasis and citation omitted)) that Section 522(e)(2) by negative implication was not intended to regulate mineral owners in the converse situation. The "departure" referred to related to an entirely separate issue, *i.e.,* whether western surface owners of formerly public land should be given some power of prior consent over the issuance of leases for the mining of federally reserved coal. S. Rep. 95-128, *supra,* at 56. See Section 714, 30 U.S.C. 1304.

whether Section 522(e)(2) effects an unconstitutional taking in violation of the Just Compensation Clause of the Fifth Amendment. 452 U.S. at 293-297. Yet petitioners contend (84-1877 Pet. 8) that they are *not* at this time challenging Section 522(e) on the ground that it amounts to a deprivation of their property interests.[11] Petitioners' Commerce Clause arguments—that there is no interstate basis upon which to justify Section 522(e) and that Section 522(e) "does not impinge in an equal way on all persons similarly engaged in interstate commerce" (84-1877 Pet. 19, 20)—have been previously addressed and rejected by this Court. See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. at 281 (Surface Mining Act protects interstate commerce); *Hodel* v. *Indiana,* 452 U.S. 314, 331-332 (1981) (claim of arbitrariness cannot rest solely on a statute's lack of uniform geographic impact).[12]

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[11] Despite their assertion that no taking claim was before the court of appeals, petitioners now argue (84-1877 Pet. 21-24) that, by upholding Section 522(e), the court of appeals has authorized the United States "to unilaterally conscript property rights" (84-1877 Pet. 21). As noted by the district court (Pet. App. 13a), the court of appeals (*id.* at 6a), and this Court in *Hodel,* 452 U.S. at 296 n.37, petitioners' taking claim is premature beause petitioners have not availed themselves of the opportunities provided under the Surface Mining Act to obtain a waiver from the restrictions imposed by Section 522(e). See *Williamson County Regional Planning Comm'n* v. *Hamilton Bank,* No. 84-4 (June 28, 1985).

[12] Because Section 522(e) constitutes a valid exercise of Congress's power under the Commerce Clause, there is no need to address petitioners' Property Clause argument. As held by the district court, "[t]he ability of the government to regulate mining activities which have an impact on federal lands within the boundaries of national forests evolves from the authority of the [Act] and *not necessarily* by virtue of the fact that the government holds the interest of the surface estate which it seeks to regulate" (Pet. App. 19a-20a (emphasis in original)).

2. Petitioner Gabriel Energy Corporation contends (84-1938 Pet. 24-29) that, because the tract on which it proposes to conduct mining operations is situated in the Redbird Purchase Unit, it is not subject to Section 522(e)(2). Although petitioner recognizes that the issue is whether Congress chose to treat "purchase units" similarly to specially-named national forest lands for purposes of regulation under Section 522(e)(2), petitioner makes no attempt to ascertain the congressional intent behind the extension of Section 522(e)(2) to "surface coal mining operations * * * on any Federal lands within the boundaries of any national forest * * *." Instead, petitioner asserts (84-1938 Pet. 26-27) that Section 522(e)(2) should be read in pari materia with 16 U.S.C. (1970 ed.) 471 and 16 U.S.C. 473, which require that the "boundaries" or "limits" of public lands set apart and reserved as national forests be established, modified, or revoked by presidential proclamation.

The legislative history of Section 522(e)(2), however, clearly indicates that Congress did not intend to exclude non-designated lands acquired pursuant to the Weeks Act, which are by law "national forest" lands, but instead used the phrase "within the boundaries of any national forest" to exclude national *grasslands* from the purview of Section 522(e). National grasslands are a part of the "national forest system" administered by the Forest Service. See Section 31 of the Bankhead-Jones Farm Tenant Act, 7 U.S.C. 1010. Consequently, the predecessor to Section 522(e)(2), S. 425, 93d Cong., 2d Sess. (1974), which originally prohibited surface mining operations in, inter alia, the "National Forest System," included national grasslands. The Conference Committee changed the reference to the National Forest System to the present language "on any Federal lands within the boundaries of any national forest" in order to exclude national grasslands from the ambit of the sur-

face coal mining prohibition. H.R. Conf. Rep. 93-1522, 93d Cong., 2d Sess. 53, 78 (1974).

In contrast to the distinction made between national grasslands and national forests, *no* distinction was made by Congress between designated and non-designated national forests for purposes of regulation of surface coal mining. Pursuant to Section 21 of the Creative Act of 1891, 16 U.S.C. (1970 ed.) 471 (repealed by Section 704(a) of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2792), the President was authorized to create national forests by setting aside and reserving lands from the public domain by proclamation. Land set aside from the public domain under the Creative Act of 1891 needed to be formally proclaimed in order to give notice that the reserved land was no longer open to entry under the public land laws. Lands acquired by purchase under the Weeks Act, however, do not require a formal presidential proclamation because their boundaries are determined by the terms of the acquisition. Once lands are acquired under the Weeks Act, the President may divide and designate the lands into specifically-named national forests. The Secretary of Agriculture also has been given that authority. 16 U.S.C. 521. What is important to note is that, while Congress has not required that lands acquired under the Weeks Act be designated as specific national forests, the Weeks Act does mandate that such lands "shall be permanently reserved, held, and administered as national forest lands." 16 U.S.C. 521. The periodic naming of the acquired lands by the President or the Secretary of Agriculture does not, therefore, alter their legal status.

Section 522(e)(2) of the Surface Mining Act does not refer to the "proclaimed" boundaries of any national forest. The only distinction drawn by Congress between national forest lands turns on geographic location. See

Section 522(e)(2)(B), 30 U.S.C. 1272(e)(2)(B) (surface coal mining operations permitted under certain circumstances in national forests west of the 100th meridan). Lands acquired under the Weeks Act are national forest lands with boundaries whether or not the President or the Secretary of Agriculture has placed the lands into a specifically-named national forest. The court of appeals correctly held that the tract in question, part of the Redbird Purchase Unit acquired, held, and administered as national forest land under the Weeks Act, is subject to the prohibitions of Section 522(e)(2) of the Surface Mining Act.

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

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